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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

ALFONSO EUGENE JOHNSON,

Defendant and Appellant.

C085267

(Super. Ct. Nos. CRF162179,
CRF154667, CRF155969)

Defendant Alfonso Eugene Johnson was convicted of arson, possession of a concealed knife, and had a prior strike. When the trial court initially sentenced defendant, it imposed a concurrent term for the concealed knife possession count. Subsequently, the trial court agreed with the People's challenge to the sentence as unauthorized and imposed a consecutive term for the knife possession count, thereby increasing defendant's aggregate term of 20 years four months to 21 years eight months.

On appeal, defendant contends the trial court erred in resentencing defendant. We agree and modify defendant's sentence to the original concurrent sentence on the concealed knife count making the aggregate term 20 years four months. Defendant also argues he is entitled to additional custody credits. The People concede the custody credit

issue and we agree. In supplemental briefing, defendant further requests we remand the case to permit the trial court to exercise its discretion to strike his serious felony enhancement, pursuant to Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1-2 (SB 1393)).

We shall modify the judgment to add 85 days' credit and remand the matter for the trial court to exercise its discretion whether to strike the prior serious felony enhancement. We shall also direct the trial court to correct clerical errors in the abstract of judgment. We otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On July 15, 2015, defendant set fire to a car that was parked in front of a home, threatening the people inside. On July 16, 2015, defendant threw a brick and smashed the glass door of a local store.

In March 2016, defendant pleaded no contest in case No. CRF155969 to felony criminal threats (Pen. Code, § 422)¹ and in case No. CRF154667 to felony vandalism (§ 594, subd. (b)(1)). He also admitted he suffered three prior prison terms (§ 667.5, subd. (b)). The parties agreed he would be sentenced to a suspended state prison sentence and would complete mental health court as a condition of being granted probation. Sentencing was scheduled for April 26, 2016.

On April 20, 2016, defendant lit his hotel room on fire by pouring charcoal lighter fluid on the blankets and igniting it with a lighter. A neighbor told police that she saw defendant leave the scene carrying a black backpack. Although defendant initially stayed by the property fence and watched the fire, he soon left to hide in the park next to the hotel. Police officers found defendant alone in the park and arrested him. Other officers retrieved the master key and opened defendant's hotel room so the fire department could extinguish the fire. After defendant was detained, he initially said he did not know how

¹ Undesignated statutory references are to the Penal Code in effect at the time of the charged offenses.

the room caught on fire, but then admitted that he set the fire. He said he was upset because had been rented the worse hotel room for a high price. Defendant helped an officer recover defendant's lighter in a trash can at the park. During the booking process, police also found a kitchen knife on defendant's person, underneath "multiple layers of clothing," tied to a drawstring on one of the pairs of shorts he was wearing. Officers had missed the knife when they searched defendant prior to arresting him. Methamphetamine was also located in defendant's belongings.

On January 18, 2017, defendant pleaded no contest in case No. CRF162179 to arson of an inhabited structure with an enhancement for accelerant use (§§ 451, subd. (b), 451.1, subd. (a)(5); count 1), carrying a concealed dagger (§ 21310; count 2), and misdemeanor possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a); count 3). He also admitted he was on release at the time of the offense (§ 12022.1, subd. (b)), had a prior serious felony conviction and a strike (§ 667), and had served three prior prison terms (§ 667.5, subd. (b)). In exchange, case No. CRF163765 was dismissed² with a *Harvey* waiver.³

On March 29, 2017, the trial court sentenced defendant to state prison for an aggregate term of 20 years four months, calculated as follows: (1) in case No. CRF162179, the low term of three years for count 1 (§ 451, subd. (b)) doubled to six years due to the prior strike plus three years consecutive for the accelerant enhancement (§ 451.1, subd. (a)(1)), 16 months concurrent for count 2 (§ 21310) doubled to 32 months due to the prior strike, six months concurrent in county jail for count 3 (Health & Saf. Code, § 11377, subd. (a)), five years consecutive for the prior serious felony (§ 667, subd. (a)(1)), two years consecutive for being on release at the time of the offense

² The record does not reflect the charges pending in case No. CRF163765.

³ *People v. Harvey* (1979) 25 Cal.3d 754, 758.

(§ 12022.1, subd. (b)), plus three years consecutive for the three prior prison term allegations (§ 667.5, subd. (b)); (2) in case No. CRF155969, eight months consecutive (one-third the midterm; § 422); and (3) in case No. CRF154667, eight months consecutive (one-third the midterm; § 594, subd. (b)(1)). The trial court imposed various mandatory fees and fines and awarded defendant 396 days' custody credit (344 days actual and 52 days conduct credit) in case No. CRF162179.

In April 2017, the People asked the court to calendar a sentence recall asserting that the original sentence was "illegal." The trial court agreed and recalled defendant's sentence on June 19, 2017.⁴ On June 22, 2017, the trial court resentenced defendant. The court stated that it had "made an error" and later said it had "made a mistake" when it originally imposed sentence, but did not state the nature of the error or mistake. The court changed the term on count 2 in case No. CRF162179 from 32 months concurrent to 8 months doubled for the strike to 16 months consecutive (one third the midterm), increasing the aggregate term to 21 years eight months. The trial court imposed various mandatory fees and fines but did not award additional custody credits.

DISCUSSION

I. Increased Sentence After Recall

Defendant contends the trial court lacked discretion to impose a greater sentence upon recall because his sentence was not unauthorized. Because a consecutive term was not mandated for count 2, we agree with defendant.

Under section 1170, subdivision (d)(1), within 120 days of commitment, a trial court may recall a sentence previously ordered and resentence a defendant "in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence." However, if the original sentence was

⁴ The record before us does not contain any details about this decision. There is no hearing transcript, nor is there a written order or decision.

unauthorized, a trial court may impose a longer term. (*People v. Karaman* (1992) 4 Cal.4th 335, 349, fn. 15.) It appears the trial court thought the original sentence was unauthorized, but it was not.

The three strikes law mandates consecutive sentences for any current felony convictions “not committed on the same occasion, and not arising from the same set of operative facts.” (§ 667, subd. (c)(6); see also *People v. Lawrence* (2000) 24 Cal.4th 219, 222-223.) Conversely, “consecutive sentences are not mandatory under subdivision (c)(6) [of section 667] if the multiple current felony convictions are ‘committed on the same occasion’ or ‘aris[e] from the same set of operative facts.’ ” (*People v. Hendrix* (1997) 16 Cal.4th 508, 512-513 (*Hendrix*), italics added.)

“Crimes are committed ‘on the same occasion’ when there is close ‘temporal and spatial proximity between the acts underlying the current convictions.’ [Citation.] Crimes ‘ “aris[e] from the same set of operative facts” ’ depending on ‘the extent to which common acts and elements of such offenses unfold together or overlap, and the extent to which the elements of one offense have been satisfied, rendering that offense completed in the eyes of the law before the commission of further criminal acts constituting additional and separately chargeable crimes.’ ” (*People v. Byrd* (2011) 194 Cal.App.4th 88, 104.)

Here, we conclude sentencing on counts 1 and 2 did not require mandatory consecutive sentences because each count was committed on the same occasion. (See *Hendrix, supra*, 16 Cal.4th at pp. 513-515.)⁵ Although police did not find the knife until after defendant arrived at the police station, there was sufficient evidence to support a finding that defendant possessed a concealed knife when he committed the arson. After

⁵ We, therefore, need not consider whether the crimes arose from the same set of operative facts or consider the authorities cited by the People in their respondent’s brief on this issue.

setting the fire, a neighbor saw defendant flee the scene and hide in the park, where police found him alone shortly thereafter and arrested him. The knife was later found underneath multiple layers of clothing, tied to a drawstring on defendant's shorts.

The trial court made no findings that defendant possessed the concealed knife on a different occasion. Nor was there any evidence to support such a finding. For example, there was no admission by defendant or testimony from a witness establishing that defendant carried the knife in a concealed manner at some other time. Given the circumstances, the evidence demonstrates that defendant possessed the concealed knife during the arson, when he left the room and immediately thereafter. Because the trial court had discretion to impose concurrent terms (*Hendrix, supra*, 16 Cal.4th at p. 514), the original sentence was not unauthorized. Thus, the trial court had no discretion to impose a longer sentence after the recall.

In the interest of judicial economy, we modify the judgment to reflect the original term imposed on count 2.

II. Custody Credits

As both parties acknowledge, the trial court erred in failing to update defendant's custody credits when it resentenced him in June 2017. When a trial court modifies a defendant's sentence, it must determine and award the actual days defendant spent in custody. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 40; see also *People v. Johnson* (2004) 32 Cal.4th 260, 267.) We shall modify the judgment to add an additional 85 days of custody credit, reflecting the time defendant spent in custody between March 30 and June 22, 2017.

III. Prior Serious Felony Enhancement

Defendant's sentence includes a five-year prior serious felony enhancement, pursuant to section 667, subdivision (a)(1). At the time defendant was sentenced, the court had no discretion to strike such an enhancement. (See § 667, subd. (a)(1); § 1385, subd. (b).)

SB 1393, which went into effect on January 1, 2019, amends sections 667, subdivision (a)(1), and 1385, subdivision (b), to allow a trial court to exercise its discretion to strike or dismiss a prior serious felony allegation for sentencing purposes.

Defendant argues that the amendments apply retroactively to his case, which is not yet final. He asks us to remand the matter so the trial court may exercise its new discretion and consider striking the prior serious felony enhancement. The People concede, and we agree.

Unless there is evidence to the contrary, it is reasonable to infer that amendments to statutes that either reduce the punishment for a crime or vest in the trial court the discretion to impose a lesser penalty, such as SB 1393, apply to all defendants whose judgments are not final as of the amendment's effective date. (*In re Estrada* (1965) 63 Cal.2d 740, 742; *People v. Garcia* (2018) 28 Cal.App.5th 961, 972-973.) There is nothing in the amendment suggesting the Legislature intended it to apply prospectively only, so the act applies retroactively to this case.

IV. Fees and Fines

During resentencing, the trial court ordered certain mandatory fees and fines, including: a \$30 restitution fine collection fee in each case (totaling \$90; § 1202.4, subd. (l)), a court operations fee of \$40 for each conviction (totaling \$200; § 1465.8), a criminal conviction assessment of \$30 for each conviction (totaling \$150; Gov. Code, § 70373, subd. (a)(1)), and a \$50 criminal laboratory analysis fee (Health & Saf. Code, § 11372.5). In our review of the record we found that these amounts are not reflected on the abstract of judgment. Instead of \$200, the abstract of judgment notes \$160 in court operations assessment fees (§ 1465.8). Instead of \$150, the abstract notes and \$120 in conviction assessments (Gov. Code, § 70373). An abstract of judgment must accurately reflect the sentencing court's oral judgment, and a court may correct errors at any time. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

DISPOSITION

The judgment is modified in case No. CRF162179 to a 32-month concurrent term for count 2 (16 months doubled to 32 months due to the prior strike) and to add an additional 85 days of custody credit. The matter is remanded to the trial court for the limited purpose of exercising discretion whether to strike the five-year enhancement pursuant to section 667, subdivision (a)(1). The court is further directed to correct the abstract of judgment to show the court operations and criminal assessment fees orally imposed by the trial court, \$200 and \$150 respectively. The judgment is otherwise affirmed. The trial court is directed to prepare an amended abstract of judgment, including the modified sentence and correct fees and fines imposed, and to forward a certified copy to the Department of Corrections and Rehabilitation.

s/MURRAY, J.

We concur:

s/BUTZ, Acting P. J.

s/DUARTE, J.